Supreme Court, U.S.
FILED
DEC 6 1994
OFFICE OF THE CLERK

No. 93-1823

(12)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

STATE OF MISSOURI, *et al.*,
Petitioners,
v.
KALIMA JENKINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE NATIONAL URBAN LEAGUE, THE CHILDREN'S DEFENSE FUND, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PEOPLE FOR THE AMERICAN WAY, THE MISSOURI ASSOCIATION FOR SOCIAL WELFARE, CITIZENS FOR MISSOURI'S CHILDREN, THE ASSOCIATION FOR THE EDUCATION OF YOUNG CHILDREN, MISSOURI, INC., AND THE GREATER KANSAS CITY ASSOCIATION FOR THE EDUCATION OF YOUNG CHILDREN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

WILLIAM L. TAYLOR *
DIANNE M. PICHÉ
2000 M Street, N.W.
Washington, D.C. 20036
(202) 659-5565
Counsel for Amici Curiae
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

37 pp

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INTEREST OF *AMICI CURIAE*

All of the *amici curiae* are organizations that engage in advocacy on behalf of children, particularly minority and disadvantaged children. The groups pursue their advocacy in a variety of ways. Some specialize in education advocacy while others work in several issue areas. Some use court litigation as a prime means of protecting

the interests of children while others emphasize legislative advocacy, developing and implementing programs of education and training, or other types of community service and action.

Although their methods of operation are diverse, the *amici* share a common objective, to assure that all children in this nation have an opportunity to develop to their full potential and to become contributing citizens in our society.

In pursuing this common goal, all of the *amici* have been assisted materially by this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), ("*Brown I*") and by the remedy decisions in the years that followed. *Brown* articulated a broad constitutional principle forbidding the denial based on race of equal educational opportunity and sought to remove the long-entrenched barriers posed by enforced racial segregation in public schools. The remedy decisions (which in some cases came almost a quarter of a century after *Brown*) gave content to the principle of equality and brought forth practical measures to redress discrimination.

However, while important progress has been made in eliminating the barriers imposed by discrimination, it is clear to *amici* that many children still suffer its effects.

The concern that prompts *amici* to file this brief is that the object of State petitioners in this case is to persuade this Court to adopt a rule which would exclude from judicial consideration information about the extent to which students suffering educational deficits that are linked with segregation are being assisted effectively in making up this lost ground. In its place, petitioners seek a rule that would terminate a State's obligation if it had made required financial contributions to educational improvements for some specified time, regardless of the effectiveness of the remedy or the need for modifications.

In the view of *amici*, the adoption of such a rule would curtail the promise of the *Brown* decision and condemn

hundreds of thousands of children to lives and opportunities stunted by the legacy of discrimination.

The individual missions of the *amici* are as follows:

The National Urban League, Inc., ("League") founded in 1910, is the premier organization in America combining social service and civil rights. The League is a nonprofit, non-partisan community-based organization headquartered in New York City, with 113 affiliates in 34 states and the District of Columbia. The purpose of the League is to assist African Americans in the achievement of social and economic equality—a mission it pursues through advocacy, bridge building, program services, and research.

Today, the League continues to provide assistance in traditional areas of concern, such as education, employment, housing, and social welfare, and has become a leader in a number of new areas, such as development for African American males. The priorities of the League include a renewed emphasis on support for inner city children and on equipping parents and community leaders to become informed consumers and effective advocates for the education of their children. To accomplish its goals, the League's approach has been to utilize fully the tools of advocacy, research, program service, and bridge building. The result has been an organization with strong roots in the community, which serves more than a million individuals each year.

The Children's Defense Fund ("CDF") exists to provide a strong and effective voice for the children of America, who cannot vote, lobby, or speak for themselves. CDF pays particular attention to the needs of poor, minority, and disabled children. CDF's goal is to educate the nation about the needs of children and encourage preventive investment in children before they get sick, drop out of school, suffer family breakdown, or get into trouble.

CDF focuses on issues of health, education, child welfare, mental health, child development, adolescent preg-

nancy prevention, family income, and youth employment. CDF's main office is in Washington, D.C. CDF maintains state offices in Minnesota, Ohio and Texas, and local project offices in Marlboro County (South Carolina), the District of Columbia, Cleveland, Cincinnati, and New York City. CDF is a private nonprofit organization supported by foundations, corporate grants and individual donations.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest and largest civil rights organization. Its principal objectives include achieving equality of rights and eliminating race and ethnic prejudice among all people in the United States; removing all barriers of racial discrimination through democratic processes; and securing the exercise of constitutional rights and the protection of civil liberties and personal dignity. The NAACP has more than 500,000 members with more than 2,100 branches in the 50 states, the District of Columbia and abroad. NAACP membership includes parents of children who attend school in Kansas City, Missouri, as well as in scores of other school districts implementing court ordered desegregation plans.

Equal educational opportunity for minority group citizens, particularly African-American youth, has been one of the fundamental goals of the NAACP since its founding. As epitomized by its role in the landmark *Brown* decision, the NAACP historically has been a leader in litigating school desegregation cases and related constitutional and civil rights issues in public education. Currently, the NAACP is a party in numerous cases across the country which address issues of equality of opportunity and quality education in public school systems.

People For the American Way ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage

of tolerance, pluralism and liberty, People For now has over 300,000 members nationwide. People For focuses much of its activity on promoting the interests of children in our nation's public schools, ranging from sponsoring educational programs to enhance citizenship and promote tolerance to assisting parents through litigation and other means to protect their children's freedom to learn. People For also has been actively involved in efforts to combat discrimination and promote equal rights, such as participating in civil rights litigation and legislation and conducting programs and studies directed at reducing problems of bias, injustice and discrimination.

The Missouri Association for Social Welfare ("MASW") is a private non-profit citizens' association dedicated to research on social policy issues, community organization, and coalition building, and public education and information. It has operated continually in Missouri since 1901. MASW's current social policy priorities are hunger, homelessness, welfare, criminal justice, health, and children's health. MASW has a longstanding interest in human rights and was one of the key leaders in creation of the Missouri Human Rights Commission in 1959. In recent years, MASW policy initiatives have included passage of a children's anti-hunger bill, advocacy for accelerated implementation of the Early and Periodic Screening, Diagnosis and Treatment Program (EPSDT), a federal children's health initiative, and other work to provide for the basic needs of children and families.

Citizens for Missouri's Children ("CMC") is a statewide organization established to be an independent voice for Missouri's children on issues, policies and government programs which affect their lives. CMC was founded in 1983 and is supported by individual contributions, memberships, corporate gifts and foundation grants, but accepts no government funding. CMC safeguards the rights of children and promotes a better quality of life for them. As a citizens' organization, CMC's job is to bring together the public and private sectors to develop a planned sys-

tematic approach that will result in more efficient and effective public services for children, to hold public officials accountable, and to mobilize individuals and groups to advocate on the behalf of children.

The Missouri Association for the Education of Young Children ("AEYC-MO") is committed to promoting quality programs and services for children from birth through age eight. The Association seeks to foster professional development opportunities for early childhood educators and child care professionals throughout the state of Missouri, and provides educational opportunities for teachers and child care providers in the Kansas City School District.

The Greater Kansas City Association for the Education of Young Children ("GKC-AEYC") is the local affiliate of the National Association for the Education of Young Children, a professional organization providing educational resources for adults who serve and act on behalf of the needs and rights of young children. GKC-AEYC is also affiliated with the Missouri and Kansas State AEYC Associations. GKC-AEYC is currently involved in projects such as lobbying for children's and family issues, the Week of the Young Child, and community organizations. GKC-AEYC recognizes a strong commitment to speak up on behalf of young children and their families within the Kansas City Missouri School District.

STATEMENT OF THE CASE

In the interest of brevity, *amici* incorporate by reference the counterstatements of the case included in the briefs for respondents Kalima Jenkins, et al., and the Kansas City, Missouri School District (KCMSD). We highlight here those findings and orders below that are most material to *amici's* argument concerning amelioration of educational harm to victims of segregation.

Over the course of the last decade, the lower courts in this case have wrestled with the legacy of over a

century of State-enforced segregation in the Kansas City, Missouri schools. The decisions of these courts chronicled the genesis and maintenance of a racially dual school system providing separate and inferior schools for black children, and determined that the victims of the State's and KCMSD's unlawful practices had suffered, and continued to suffer, real educational harm as a result. *See, e.g., Jenkins v. Missouri*, 593 F. Supp. 1485 (W. D. Mo. 1984); *Jenkins v. Missouri*, 639 F. Supp. 19 (W. D. Mo. 1985); *Jenkins v. Missouri*, 672 F. Supp. 400 (W. D. Mo. 1987); *Jenkins v. Missouri*, 807 F.2d 657 (8th Cir. 1986) *cert. denied*, 484 U.S. 816 (1987); *Jenkins v. Missouri*, 855 F.2d 1295 (8th Cir. 1988); *Jenkins v. Missouri*, 949 F.2d 1052 (8th Cir. 1991); *Jenkins v. Missouri*, 11 F.3d 755 (8th Cir. 1993); *Jenkins v. Missouri*, 19 F.3d 393 (8th Cir. 1994).

The most pervasive harm to KCMSD's children from segregation, the District Court found, has been "a system wide *reduction* in student achievement in the schools of the KCMSD." 639 F. Supp. at 24 (emphasis in original). The Court observed that "[the] education process has been . . . 'bogged down' in the KCMSD by a history of segregated education. Too often, as a result, a higher percentage of black students are among the lower achievers. The cost of this undereducation is enormous." *Id.* at 28. The Court noted that on standardized achievement tests of basic skills in mathematics and reading, "only a few" of KCMSD's elementary schools achieved at or above national norms. *Id.* at 24. The deficiencies were particularly acute in reading. *Id.*

The record in the case also indicates serious shortcomings in the related areas of curriculum and teaching. For example, when the U.S. Department of Health, Education, and Welfare required KCMSD to desegregate its teaching staff in the 1970s, the District transferred its best and most capable teachers to white schools, leaving less capable teachers in predominantly black schools. Brief of

Respondents in Opposition to Certiorari ("R. Op. Cert.") at 4 (citing Tr. at 3298-99, 3304-06). Academic subjects in black schools were eliminated, with college preparatory classes, particularly in math and science, replaced with vocational courses in subjects such as "janitorial services." R. Op. Cert. at 4 (citing Tr. at 7018-21, 7338-41, Stip. 75). As the Court noted, the State's own rating system of school districts, which evaluates, *inter alia*, teacher qualifications and curricular offerings, indicated KCMSD lagged far behind all other school districts in the Kansas City area with regard to its capacity to provide a "minimally adequate education to its students." 639 F. Supp. at 26.[1]

Moreover, the District Court has found that the State's and KCMSD's segregative practices not only resulted in the provision of inferior educational opportunities to its young victims, but also created a "general attitude of inferiority among blacks . . . [which itself] produces low achievement . . . [and] ultimately limits employment opportunities and causes poverty." 593 F. Supp. at 1492.

On the matter of remedy, the District Court found, and experts of all parties agreed, that the educational deficits identified were "correctable." 639 F. Supp. at 24. The educational improvements ordered by the Court included the provision of additional counselors, librarians and library materials; additional teachers to reduce class size; professional development; an early childhood development program; a full-day kindergarten program; a summer

[1] The District Court in 1985 found that KCMSD's and the State's unlawful segregation had contributed to a decline in the District's educational rating to the lowest in the area. While all other school districts in the Kansas City area obtained the State's highest rating, indicating that they had the resources necessary to provide a minimum basic education to their students, since 1977 KCMSD alone had a lower rating. Under this accreditation system, the State classifies local school districts according to the quality and quantity of the educational program and services they offer, including teacher qualifications, class size, instructional equipment, library resources, and instructional materials. 639 F. Supp. at 26.

school program; and before and after-school programs in selected schools; as well as voluntary student transfers to specialized magnet schools and voluntary interdistrict transfers. *Id.* at 26-39.

Although ordered in 1985, these educational programs were implemented in phases and were not fully in place until 1988 or 1989. R. Op. Cert. at 14; State Petition ("Pet.") at 12. Since then, there has been progress in student achievement. In most subject areas at most grade levels, scores on standardized tests have risen, and other measures of educational progress, including attendance, graduation, and suspension rates, have shown modest improvement in recent years. *Id.*

Notwithstanding such gains, the District Court found, and the Court of Appeals affirmed, that significant educational harm to children persists in KCMSD schools. Indeed, about a quarter of the District's students remain among the lowest achieving students in the nation, and graduation rates, while improving, remain low. *Id.* at 16.

Thus, the District Court has found that while there has been "substantial" progress in desegregating KCMSD's schools, more desegregation progress is necessary and practicably attainable, and has concluded that, although "there has been a clear trend of improvement in academic achievement in the KCMSD," more progress is still to be made. *Id.* (citing App. 131). Indeed, in approving KCMSD's request for continuation of its *Milliken II* programs for the 1993-94 and 1994-95 school years, Judge Clark asserted:

> The Court does find that the *Milliken II* components have been partially successful in implementing the goals and standards of the desegregation remedy. However, these components have not yet met these goals in their entirety. The Court finds that it would be wholly inappropriate to deem the KCMSD unitary or partially unitary at this time.

Id. (citing App. 112-13).

The Court of Appeals affirmed the District Court's findings that the State had not met its burden of establishing partial unitary status, noting that the evidence established that, at most, a start had been made in eliminating the vestiges of segregation in the District. The Court concluded that the "evidence in the record fell far short of establishing that such vestiges had been eliminated to the extent practicable." *Id.* (citing App. 19).

SUMMARY OF ARGUMENT

At least since this Court's unanimous decision in *Milliken II*, it has been clear that educational harm found to be linked with racial segregation of the public schools is a vestige of the constitutional violation that must be eliminated to the extent practicable before a court may declare that a school system has achieved unitary status. The claim of the State of Missouri to the contrary lacks support. While educational deficits are not explicitly listed as a "*Green* factor," this Court held in *Freeman v. Pitts* that *Green* was not a rigid framework and that other elements could be considered on an application for unitary status. In *Milliken II*, the Court established the responsibility of state and local officials to adopt remedies that go beyond physical desegregation of schools, and that address deficits in reading and other areas that are caused by racial and cultural isolation. The Court also made clear that the duty of state officials was a continuing one and that time would be required to eliminate educational deficits.

Once it is acknowledged that educational vestiges of segregation must be eliminated before unitary status can be achieved, the propriety and necessity of considering evidence concerning student achievement is apparent. Excluding such evidence would be inconsistent with remedial principles emphasizing practical results and effectiveness that this Court established in *Brown* and has followed in cases including *Green, Swann, Milliken II, Dayton II, Columbus,* and *Freeman,* ever since.

Scores on standardized tests are certainly not the only appropriate indicator. Other measures may include, for example, students' access to resources, teacher preparation, drop-out rates, college-going rates, and other factors. But academic outcomes can be excluded from consideration only at the cost of ignoring three decades of research and practical experience on the impact of desegregation remedies. The research demonstrates that desegregation and allied educational improvement measures have often worked to improve the performance of black students and over time have had a positive impact on their opportunities to go on to college and obtain good jobs. The measures that have helped produce these positive changes include early childhood education, better professional preparation of teachers, reading programs in the early grades, and other initiatives denominated as *Milliken II* relief. They also include desegregation itself and validate the use of magnet schools and other programs to increase desegregation.

While there is an unquestionable link between socioeconomic status and educational outcomes, there is striking data that the performance of poor children improves when they are placed in settings where they are integrated with nonpoor children and when they are provided with targeted educational programs. Such data confirm the utility of desegregation and *Milliken II* remedies for constitutional violations as important means for eliminating educational vestiges.

Adoption of the position urged by the State would exclude evidence that could lead to the modification and improvement of previously-approved relief. It would also lead to the curtailment of remedies before minority children had the opportunity to reap their benefits. Such a result would not be consistent with *Brown* and its progeny.

ARGUMENT

I. EDUCATIONAL HARM LINKED TO RACIAL SEGREGATION OF PUBLIC SCHOOLS IS A VESTIGE OF SEGREGATION THAT MUST BE ELIMINATED TO THE EXTENT PRACTICABLE BEFORE DEFENDANTS CAN ACHIEVE UNITARY STATUS

In their latest effort to frame the issues in this case for this Court's review, the State of Missouri petitioners assert that the appropriate criteria for determining unitary status are found within the four corners of the remedial analysis in *Green v. County School Board*, 391 U.S. 430 (1968), and that matters having to do with educational quality or student performance, not being among the explicit "*Green* factors," may not be considered in making unitary determinations. Petitioners' Brief ("P.B.") at 20.

This view of the law is clearly incorrect. As this Court said in its most recent decision concerning unitary status:

> It was an appropriate exercise of discretion for the District Court to address the elements of a unitary system discussed in *Green*, to inquire whether other elements ought to be identified, and to determine whether minority students were being disadvantaged in ways that required the formulation of new and further remedies to insure full compliance with the court's decree . . . [T]he *Green* factors need not be a rigid framework.

Freeman v. Pitts, 112 S. Ct. 1430, 1446-47 (1992).

Thus, for example, although not mentioned as a factor in *Green*, a court, in fashioning a school desegregation remedy and in determining whether the housing vestiges of segregation have been eliminated to the extent feasible, may consider the extent to which segregated residential patterns have been caused by past school segregation. *See Freeman*, 112 S. Ct. at 1454 (Souter, J., concurring) (citing *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 21 (1971)); *see also Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 250 n.2 (1991) (discussing treatment of housing vestiges of school segregation).

The error of the State's assertion that only *Green* factors may be considered in determining unitary status becomes fully apparent when this Court's unanimous decision in *Milliken II* is examined. *Milliken v. Bradley*, 433 U.S. 267 (1977). That case involved the question at issue here—i.e., the responsibility of State and local defendants to address educational deficits associated with unlawful segregation. This Court's decision established two principles: (1) that racial segregation of public schools may bring about educational deficits that require remedies beyond physical desegregation, and (2) that the duties of defendants to deal with these deficits continue until they are eliminated insofar as is practicable.

On the first principle, the Court used as an example "habits of speech, conduct and attitudes reflecting . . . cultural isolation of minority children." The decision concluded that:

> Pupil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation; the consequences linger and can be dealt with only by independent measures. In short, speech habits acquired in a segregated situation do not vanish simply by moving the child to a desegregated school. The root condition shown by this record must be treated directly by special training at the hands of teachers prepared for that task.

433 U.S. at 287-88.

On the second principle—the continuing obligation of the defendants to correct conditions of educational inequality—the decision was very specific:

> These [educational] programs were not, and as a practical matter could not be, intended to wipe the

> slate clean by one bold stroke . . . Rather . . . the victims of Detroit's de jure segregated system will continue to experience the effects of segregation until such future time as the remedial programs can help dissipate the continuing effects of past misconduct. Reading and speech deficiencies cannot be eliminated by judicial fiat; they will require time, patience and the skills of specially trained teachers . . . [These programs] are part of a plan that operates *prospectively* to bring about the delayed benefits of a unitary system.

Id. at 291 (emphasis in original).

In sum, this Court in *Milliken II* evinced a central concern with the educational disadvantage that is associated with practices of unlawful segregation. After *Milliken II*, there could be no question but that where the issue is appropriately presented, such educational deficits must be addressed in a desegregation decree and that progress in eliminating these deficits would be considered in later determinations of unitary status.

II. IN DETERMINING WHETHER EDUCATIONAL VESTIGES OF SEGREGATION HAVE BEEN ELIMINATED TO THE EXTENT PRACTICABLE, EVIDENCE CONCERNING STUDENT PERFORMANCE IS APPROPRIATE AND INDEED NECESSARY

To the extent that State petitioners acknowledge that addressing educational vestiges is an appropriate part of a desegregation decree, their claim appears to be that any obligation of the State is fully satisfied by a yearly contribution to educational improvements for a specified period of time, regardless of the effectiveness of the remedy. The State's position simply does not square with the jurisprudence of this Court since *Brown v. Board of Education*, a jurisprudence that has focused intensely on achieving practical results. Nor do the State's dour suggestions that court-approved remedies do not bring about educational change (P.B. at 48-49) square with the positive experience that many communities have had with desegregation and *Milliken II*-type remedies, experience well-documented by careful social science research.

A. Excluding Evidence of Educational Outcomes Would Be Inconsistent with the Remedial Principles Emphasizing Effectiveness and Practical Results That This Court Established in *Brown* and Has Followed to the Present Day

At least since its decision in *Brown v. Board of Education*, this Court has been centrally concerned with the damaging effects that enforced racial segregation and other denials of equal protection of the laws have on the lives and opportunities of children, and with shaping remedies in ways that will effectively redress the harm.

In *Brown I*, after delineating the ways in which educational opportunity "on equal terms" is critical to economic success and to performing the responsibiliites of citizenship, this Court quoted with approval the finding of the lower court that:

> "[s]egregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental developments of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."

347 U.S. at 494.

In *Brown II*, the remedy decision, in establishing principles for dismantling racially dual school systems, the Court stated that equitable principles would control and stressed that equity traditionally "has been governed by a *practical flexibility* in shaping its remedies and by a facility for reconciling public and private needs." *Brown v. Board of Education*, 349 U.S. 294, 300 (1955) ("*Brown II*") (emphasis supplied).

When this Court came to examine the sufficiency of particular proposed remedies in the 1960s and 1970s, it

became even more pointed in its emphasis on results and effectiveness. Thus, in *Green v. County School Board*, 391 U.S. 430 (1968), the Court spoke of the "heavy burden upon the [defendant] board to explain its preference for an apparently *less effective method*," the obligation of district courts to "assess the *effectiveness* of a proposed plan," and the need for courts to retain jurisdiction because "whatever plan is adopted will *require evaluation in practice*." *Id.* at 439 (emphasis supplied). The ultimate test, the Court made plain, was results:

> The burden on a school board today is to come forward with a plan that promises realistically to work and promises realistically to work *now*.

Id. (emphasis in original).

As noted in Section I, *supra*, the Court's concern with practical results continued to be manifested in its decision in *Milliken II*. That decision identified reading and speech deficiencies as specific vestiges of an unlawfully segregated system and approved remedies that the Court recognized would require "time, patience and the skills of specially trained teachers in order to dissipate the continuing effects of past misconduct." 433 U.S. at 291. It is simply not possible to read *Milliken II* in a way which excludes evidence of the impact of educational improvement programs on the performance of children from a determination of whether the educational vestiges of segregation have been eliminated to the extent practicable.

The Court's consistent focus on the practical effectiveness of remedy was manifested again in its reiteration in *Dayton II* and *Columbus* of the duties of defendants to take affirmative steps to disestablish the dual system "and its effects," and in its approval of effective systemwide remedies. *See Dayton Board of Education v. Brinkman*, 443 U.S. 526, 535 (1979) ("*Dayton II*"); *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979).

The thread established in *Brown* has been extended most recently in the Court's discussion of the remedial

context in which issues of unitary status are to be considered:

> The essence of a Court's equity power lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the conditions or redress the injuries caused by unlawful action.

112 S. Ct. at 1444.

In sum, over the past forty years, the opinions of this Court have exhibited a remarkable continuum of concern with the practical effectiveness of remedies designed to redress the devastating effects of the legalized caste system of segregation.

In applying equitable principles to the removal of educational vestiges, a variety of indicators relating both to inputs and outcomes appropriately may be used. These may include, for example, student access to resources; teacher preparation; the availability of counseling; discipline policies and rates; student tracking and ability grouping (including the proportions of minority children in special education, and gifted and talented programs); student performance on standardized achievement tests or other assessments of student performance; drop-out, grade retention, attendance, and college-going rates; and the like.[2]

The salient factors and precise contours of an effective or adequate remedy best can be determined in the context of records established in particular cases. But acceptance of the State's claim that evidence of student performance should be excluded would deprive the courts of a principal means of determining whether past injuries were in fact being redressed.

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[2] Interestingly, many of these indicators, including student performance on standardized achievement tests, were approved by the petitioners, Missouri State Board of Education, in January 1993 for use in assuring that school districts throughout the State meet State standards. Missouri School Improvement Program, *MSIP Review Procedures 1994-95* (February 1993).

B. Desegregation and Associated Educational Improvements Have Been Demonstrably Effective in Eliminating Educational Vestiges and Should Be Given an Adequate Opportunity to Work in This Case

1. Although their position on this appeal presents something of a moving target, it appears that State petitioners contend that the appropriate standard for determining whether educational vestiges of segregation have been eliminated to the extent practicable is based entirely on inputs—whether defendants contributed the resources called for by the Court for a period of time sufficient to infer that educational opportunities must have improved. See Joint Appendix ("J.A.") at 439. Standards that are based in part on measures of educational outcomes are rejected, apparently because outcomes may be influenced to some degree by non-school related factors and because the Eighth Circuit panel "simply assumed, *without any basis*, that the State could succeed in raising test scores, apparently through the continued application of massive resources". P.B. at 48-49 (emphasis supplied).

Amici leave it to the parties to explicate the consideration given by the courts below to the link between educational measures and improved test scores in this case, noting only that the District Court did find that the *Milliken II* components "have been partially successful" in implementing the goals of the desegregation remedy, Petitioners' Appendix ("P.A.") at 112-13, and that the burden of proof is on the defendant (not the plaintiffs or the court) to demonstrate that vestiges of discrimination have been cured to the extent practicable. 112 S. Ct. at 1447.

But to the extent that State petitioners are arguing that there is "no basis" for concluding that remedies of the kind implemented in this case can have a positive impact on educational outcomes, they are ignoring three decades of research and practical experience.

In the largest study of its kind, involving some 600,000 students, a report commissioned under the Civil Rights Act of 1964 found a relationship between school desegregation and improved achievement by black students. Office of Education, Department of Health Educational and Welfare, *Equality of Educational Opportunity* at 28-30 (1967). Subsequent studies reanalyzing the same data confirmed these findings and concluded that racial isolation, not simply socioeconomic segregation, was a cause of lower achievement for poor minority students, U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* (1967). *See also* Frederick Mosteller and Daniel P. Moynihan, *On Equality of Educational Opportunity* (1972).

These studies, conducted before any widespread implementation of *Brown* had occurred in the South, received striking confirmation at the end of the 1970s. At a time of concern about stagnation and decline in the achievement of public school students, the National Assessment of Educational Progress (NAEP) reported gains in cognitive skills by black students. Between 1970 and 1980, the greatest gains in reading skills among nine-year old children, black or white, were made by black students who attended public schools in the Southeast United States. National Assessment of Educational Progress, *Three Assessments of Progress in Reading Performance, 1970-1980* (Rep. No. 11-R-01 April 1981). In addition, the only significant overall gain among the reporting groups of 13-year olds occurred for black students. *Id.* at xiii. While the NAEP study did not ascribe causes to its report of educational gains, the most notable educational change in the Southeast was the advent of widespread school desegregation, occasioned by this Court's decisions in *Green* and *Swann* and by enforcement of the Civil Rights Act of 1964.

Moreover, the implications of the NAEP study were substantiated by case studies demonstrating that in most situations where courts have ordered school desegrega-

tion, the achievement of minority students has risen, sometimes significantly, while the scores of white students remained unchanged or rose slightly. Robert L. Crain and Rita E. Mahard, *Desegregation Plans that Raise Black Achievement: A Review of the Research*, at 35-45 (1982). *See also* Janet W. Schofield, *Black and White in School: Trust, Tension, or Tolerance?* (1989).

The gains associated with desegregation have not been limited to improvements on standardized achievement tests. *Id.* In the longer term, researchers have concluded, black children attending desegregated schools are more likely to complete high school, to enroll in and graduate from four-year desegregated colleges, and to major in subjects that lead to more remunerative jobs and professions. James McPartland, *Desegregation and Equity in Higher Education and Employment: Is Progress Related to the Desegregation of Elementary and Secondary Schools?*, 42 Law and Contemporary Problems 108, 110-13, 124, 131 (Summer 1978); James McPartland and JoMills Braddock, *Going to College and Getting a Good Job: The Impact of Desegregation*, in *Effective School Desegregation* 141, 146, 150 (W. Hawley ed. 1981). Other research shows that low-income black children who receive a desegregated education have a good chance to avoid the social pathology (such as hostile encounters with the police or teenage pregnancy) that blights the prospects of many of their peers. *See* Robert L. Crain et al., *Finding Niches: Desegregated Students 16 Years Later* (Rand Corporation, Rep. R3243-NIE, 1985). *See also* Robert L. Crain and Jack Strauss, *School Desegregation and Black Occupational Attainments: Results from a Long-Term Experiment* (Center for Social Organization of Schools, The Johns Hopkins University, Rep. No. 359, July, 1985).

Just as desegregation has been linked by many studies with positive outcomes of various kinds, so, too, a body of experience and research has demonstrated that the educational improvement measures generally denominated as

Milliken II relief have brought progress. In the instant case, the *Milliken II* remedy has included an early childhood education program; measures to increase the time for instruction through means such as summer school programs, full day kindergarten, and extended day programs in selected schools; lowering class-size through the addition of teachers; and professional development focussing on desegregation and improving student achievement. J.A. at 63, 70, 72, 74. *See also* 639 F. Supp. at 35. Several of these educational components have long been associated with court-ordered desegregation. So, for example, Crain and Mahard find that the best progress through desegregation appears to have occurred where desegregation began in the earliest grades and where comprehensive programs were instituted that included diagnostic and compensatory services for children and professional development for teachers. Crain and Mahard, *Desegregation Plans, supra.*

The gains associated with *Milliken II*-type educational improvement initiatives also have been demonstrated by research into the effectiveness of these measures when taken apart from a school desegregation case. For example, studies have shown positive results stemming from the availability of preschool child development programs for three-and four-year olds. The most widely noted of these studies tracked the lives of disadvantaged children who had participated in a preschool program in Ypsilanti, Michigan in the 1960s. The children were matched with a demographically similar group of disadvantaged children who did not participate in the program. By age 19, the report noted striking differences. Those students who had participated in the program scored higher on standardized tests, were more likely to have graduated from high school, to be enrolled in college or to be employed, and were more likely to have avoided various forms of pathology. John R. Berrueta-Clement et al., *Changed Lives: The Effects of the Perry Pre-School Program on Youths through Age 19* at 34-35, 57-60 (1984). Sim-

ilar conclusions have emerged from a longitudinal evaluation of a New York State program and from evaluations of other early childhood initiatives. *See* Fern Marx and Michelle Seligson, *The Public School Early Childhood Study: The State Survey* 3 (1988); *see also A Better Start: New Choices for Early Learning* (Fred M. Hechinger ed., 1986).

Moreover, a growing body of evidence has developed regarding other promising educational initiatives on behalf of minority and disadvantaged children, including all-day kindergartens and programs designed to improve reading skills in the primary grades. *See, e.g.*, Robert E. Slavin, *After The Victory: Making Funding Equity Make a Difference*, 33 Theory Into Practice 98 (1994); Robert E. Slavin and Nancy A. Madden, *What Works for Students at Risk: A Research Synthesis*, 46 Educational Leadership 4 (1989). Researchers have found the effects of all-day kindergarten (rather than the traditional half-day) to be comparable to those of preschool in that children who participate develop language and other skills important to success in the first grade. *See, e.g.*, Nancy L. Karweit, *Effective Kindergarten Programs and Practices for Students at Risk of Academic Failure*, in *Effective Programs for Students at Risk* (Robert E. Slavin et al. eds., 1989). Effective reading programs are premised on the belief that any educational failures are rooted in and exacerbated by failure to read competently by the end of the early elementary grades. The programs often involve one-on-one tutoring, additional time before or after school, and frequent assessment of children for prompt diagnosis and treatment of reading problems. *See, e.g.*, Robert E. Slavin, *School and Classroom Organization in Beginning Reading: Class Size, Aides, and Instructional Grouping, in Preventing Early School Failure* 122 (Robert E. Slavin, Nancy L. Karweit, Barbara A. Wasik and Robert E. Madden eds., 1994); Robert E. Slavin, et al., *Whenever and Wherever We Choose: The Replication of "Success for All,"* 75 Phi Delta Kappan

639 (1994); Barbara A. Wasik and Robert E. Slavin, *Preventing Early Reading Failure with One-to-One Tutoring: A Review of Five Programs*, 28 Reading Research Quarterly 179 (1993); Nancy A. Madden et al., *Success for All: Longitudinal Effects of a Restructuring Program for Inner-City Elementary Schools*, 30 American Educational Research Journal 123 (1993); *Bridges to Literacy: Learning from Reading Recovery* (Diane E. DeFord, Carol A. Lyons and Gay Su Pinnell eds., 1991). Gay Su Pinnell, *Success for Low Achievers Through Reading Recovery*, 48 Educational Leadership 17 (1990); Gay Su Pinnell, *Reading Recovery: Helping At-Risk Children Learn to Read*, 90 Elementary School Journal 161 (1989). By ensuring that children succeed in learning to read in the early grades, schools often achieve other desirable outcomes, including a reduction in retentions in grade and in special education placements. *See, e.g.*, Slavin, *After the Victory* at 101, and sources cited therein; Carol A. Lyons, *Reading Recovery: A Preventative for Classifying Children as Learning Disabled*, 24 Urban Education 125 (1989).

Several other measures, many of which have been included in the remedy in this case, are considered by educational experts to be important to the academic success of disadvantaged children. Comprehensive, ongoing staff development programs for teachers in challenging curriculum and in effective instructional practices have improved achievement. *See* Slavin, *After the Victory* at 102, and sources cited therein; Commission on Chapter 1, American Association for Higher Education, *Making Schools Work for Children in Poverty: A New Framework Prepared by the Commission on Chapter 1* 48-55 (1992); Nancy Adelman et al., Staff Development for Teachers of Disadvantaged Students (available from Policy Studies Associates, Washington, D.C.) (June 1991). Particularly in the context of desegregation, researchers have found it important to train teachers in instructional methods that promote cooperative learning and reduce

reliance on tracking or ability grouping. *See* Janet W. Schofield, *Promoting Positive Peer Relations in Desegregated Schools,* 7 Educational Policy 297 (1993). *See also,* Anne Wheelock, *Crossing the Tracks: How "Untracking" Can Save America's Schools* (1992); Jeannie Oakes, *Can Tracking Research Inform Practice?,* 21 Educational Researcher 12 (1992). Initiatives to improve parent involvement are effective not only in helping parents to feel connected to their children's schools, but also in equipping parents to assist their children with homework and to take other steps outside of school to support high achievement. *See, e.g.,* Ron Brandt, *On Parents and Schools: A Conversation with Joyce Epstein,* 47 Educational Leadership 24 (1989); Joyce L. Epstein, *Effects on Students' Achievement of Teachers' Practices of Parent Involvement,* 5 Advances in Reading Language Research 261 (1991).

Researchers have also demonstrated the importance to disadvantaged children of measures including: school counselors and other measures to address children's health and social needs; improvements in teaching and curriculum and other "effective schools" measures; and reductions in class size. *See, e.g.,* Robert E. Slavin, *Statewide Finance Reform: Ensuring Educational Adequacy for High-Poverty Schools,* 8 Educational Policy 425, 427-28 (1994); William L. Taylor and Dianne M. Piché, *A Report on Shortchanging Children: The Impact of Fiscal Inequity on the Education of Students at Risk,* H.R. Doc. No. 36-895, 101st Cong., 2nd Sess. 25-32 (1990), and sources cited therein. *See also* Ronald F. Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters,* 28 Harv. J. on Legis. 465 (1991); Richard J. Murnane, *Interpreting the Evidence on "Does Money Matter?"* 28 Harv. J. on Legis. 457 (1991); David Card and Alan B. Krueger, *Does School Quality Matter? Returns to Education and the Characteristics of Public Schools in the United States* (National Bureau of Economic Research Working Paper No. 3358, 1990).

None of the foregoing is intended to suggest that initiatives of the kind discussed above may be attached to a desegregation plan simply because there is evidence that they are promising vehicles for educational progress. Clearly, findings must be made (as they have in this case) that a constitutional wrong has been committed and that the programs proposed are appropriate and necessary measures for removing the educational vestiges of segregation. Nor do *amici* argue that the educational benefits of desegregation and *Milliken II*-type remedies are uncontested. Some economists, without focusing particularly on desegregation or *Milliken II,* have conducted broad analyses suggesting that few educational expenditures yield significant results. *See, e.g.,* Eric A. Hanushek, *When School Finance "Reform" May Not Be Good Policy,* 28 Harv. J. on Legis. 423 (1991) and sources cited therein at 426, n.12. But the methodology and claims of those "production function" studies have been sharply challenged. *See, e.g.,* Rob Greenwald, Larry V. Hedges, and Richard D. Laine, *When Reinventing the Wheel is Not Necessary: A Case Study in the Use of Meta-Analysis in Education Finance,* 20 Journal of Education Finance 1 (1994); Ferguson, *Paying for Public Education, supra*; Murnane, *Interpreting the Evidence, supra.*

The accumulated experience of the past three decades, as summarized above, provides strong assurance that just as racial segregation of children led to serious educational harm, so measures that alleviate segregation and address the harm associated with it can lead to practical gains for those who have suffered injury. Indeed, after analyzing data compiled by the National Assessment of Educational Progress over two decades, two noted researchers have concluded that great progress has been made in reducing the educational deficits of black children. As reported by Marshall S. Smith (now Undersecretary of Education) and Jennifer O'Day, black children born in 1971 scored an average of 189 on NAEP reading tests when they were

nine years old, 236 when they were thirteen, and 274 when they reached the age of seventeen in 1988; white children born in 1971 scored 221, 263, and 295 at the same junctures. The authors conclude:

> These are extraordinary data. By conservative estimate, they indicate a reduction in the gap between African American and White students over the past 20 years of roughly 50% when the students are 17 years old.

Marshall S. Smith and Jennifer O'Day, *Educational Equality: 1966 and Now*, in *Spheres of Justice in Education: The 1990 American Education Finance Association Yearbook* 53, 74 (Deborah A. Verstegen and James G. Ward eds., 1991). *See* National Research Council, *A Common Destiny: Blacks and American Society* 348-350 (Gerald D. Jaynes and Robin M. Williams eds., 1989) (describing an "overall pattern . . . of improvement among blacks and decline in the difference between blacks and whites").

In sum, findings of this kind refute State petitioners' suggestion that there is no basis for believing that court-approved remedies can have an impact on educational outcomes. What the State is seeking is not an end to remedies that do not work but an end to remedies that have worked in many situations without hearing evidence about their effectiveness.

2. Two other points call for brief comment. Although the magnet program was not at issue in the State petitioners' effort to end their contribution to *Milliken II* relief in the lower courts, the State's brief attempts to place magnet relief in issue in this Court. P.B. at 10-12. Lacking a record, it is difficult to know what precisely is at issue, and *amici* do not propose in this brief to review the literature on the efficacy of magnet schools as an educational remedy.

Yet it is worth noting that the objective of magnet schools is to reduce racial isolation and that desegregation has itself been demonstrated to be a valuable instrument for eliminating the educational vestiges of a dual system. *See, e.g.*, Crain and Mahard, *Desegregation Plans that Raise Black Achievement: A Review of the Research, supra*. Whether there are alternate techniques of achieving desegregation that would serve as well to eliminate the educational vestiges; whether the particular programs adopted were appropriate remedies for the violations found; and whether the principal effort was to attract or retain students from within the jurisdiction or to attract students in suburban jurisdictions (and, if the latter, whether State constitutional wrongdoers may be required to support voluntary interdistrict remedies), may all be appropriate questions for this Court to examine on the establishment of an appropriate record, assuming they have not been dealt with previously. But no basis has been established here for terminating or foreclosing magnet remedies which not only redress the unconstitutional condition of racially segregated schools but which may help to eliminate the educational vestiges of such segregation.

3. Throughout their petition and brief, State petitioners raise the link between the "nonschool" factor of poverty and student achievement as a barrier to using educational outcomes as a measure of the effectiveness of desegregation and *Milliken II* relief. Pet. at 19-20, P.B. at 48-49. At a minimum, the suggestion appears to be that the combination of school and nonschool factors that contribute to educational outcomes is so entangled that it is not possible to reach conclusions about the efficacy of particular school initiatives. Beyond that, in arguing that there is a lack of basis for the belief that the "state could succeed in raising test scores," State petitioners appear to be contending that educational interventions on behalf of minority students who are poor are bound to be unavailing.

Neither suggestion withstands scrutiny. The research cited above that finds a link between desegregation or par-

ticular educational initiatives and positive outcomes has been carefully conducted to assure the validity of the conclusions. So, for example, longitudinal studies that have examined the long term effects of desegregation and early childhood education have included as control groups children of the same socio-economic status. *See* Crain and strauss, *School Desegregation and Black Occupational Attainments, supra*; Berrueta-Clement et al., *Changed Lives: The Effects of the Perry Pre-School Program on Youth Through Age 19, supra.*

Moreover, the same national research that shows that schools with high concentrations of poverty provide adverse environments for learning also shows that equally poor children in low-poverty schools perform significantly better. The most recent study finds that 30 percent of poor children in schools with a high concentration of poverty score in the lowest tenth percentile, three times the percentage of equally poor children who are in schools with a low proportion of students living in poverty. In contrast, poor children in low-poverty schools score in the top half at almost twice the rate as poor children in high-poverty schools. *See* U.S. Department of Education, *National Assessment of the Chapter 1 Program: The Interim Report* 160 (1992). While studies such as these confirm the debilitating effects of poverty, they also validate the efficacy of desegregation and other initiatives that improve the environment for learning.

CONCLUSION

State petitioners emphasize the length of the legal struggle over remedies for segregation in KCMSD's schools, and base much of their appeal on the presumed desirability of attaining closure in this case. It is true that four decades have passed since the *Brown* decision and, as State petitioners note, that the *Jenkins* litigation has been in Court for seventeen years. Pet. at 12. But it is not the fault of the plaintiff class that *Brown* was not implemented

in most places for more than a decade, that the principles governing the constitutional obligations of States and school districts in the North and West were not established until 1973, that key aspects of remedy law were not identified by this Court until 1977, and that children in some jurisdictions in this nation have not reaped the benefits of the *Brown* decision to this day. Indeed, as the State concedes, the *Milliken II* aspects of remedy in Kansas City were not "fully in place" until 1989, Pet. at 12, and, as respondents assert, some aspects of remedy have not yet been fully implemented.

In the view of *amici,* it would be perverse in the extreme if difficulties and long delays in affording relief occasioned largely by entrenched racial attitudes and practices were to become the unspoken basis for curtailing future remedy.

In the past, decisions of this Court have gone astray when they have cast aside information on the impact of laws on human lives in favor of formulaic principles ungrounded in facts. For example, in *Plessy v. Ferguson,* 163 U.S. 537 (1896), this Court created a fiction, unsupported by sociological research or practical experience, that if racial segregation laws stamp black citizens with a badge of inferiority, it was "solely because the colored race chooses to put that construction upon it." 163 U.S. at 550.

In this case, the State petitioners ask the Court to discard experience and research on the impact of educational remedies in favor of a rule that would curtail redress on the application of arbitrary criteria. As in *Plessy,* application of such a rule would leave without a remedy many persons who have suffered constitutional harm. *Amici* respectfully urge that this Court employ the equitable test of practical effectiveness that it has applied consistently since *Brown,* to assure that all relevant evidence on the impact of court-approved remedies will be considered before unitary status is declared. Only if this is done

will children have the prospect of realizing the "delayed benefits of a unitary system" promised in *Milliken II*.

Respectfully submitted,

WILLIAM L. TAYLOR *
DIANNE M. PICHÉ
2000 M Street, N.W.
Washington, D.C. 20036
(202) 659-5565
Counsel for Amici Curiae

* Counsel of Record